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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1791

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., ET AL.,

Appellant,

V.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General for Litigation

MARY F. KELLER
Special Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-0671

Attorneys for Appellees

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

Whether state licensing of child-care facilities operated by religious institutions violates the Free Exercise Clause of the First Amendment to the Constitution of the United States.

II.

Whether state licensing of child-care facilities operated by religious institutions violates the Establishment Clause of the First Amendment to the Constitution of the United States.

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IN THE
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OCTOBER TERM, 1984

NO. 84-1791

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., ET AL.,

Appellant,

V.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

Appellee, the State of Texas, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas on the ground that the federal question is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a suit brought by the State of Texas to enforce provisions of the Human Resources Code requiring a state license for the operation of child-care facilities against the Corpus Christi People's Baptist Church, Inc. The licenses are required pursuant to Section 42.001, *et seq.* of the Texas Human Resources Code, whose purpose is to:

> protect the health, safety, and well-being of the children of the state who reside in child-care facilities by establishing statewide minimum standards for

> their safety and protection and by regulating the facilities through a licensing program. It is the policy of the state to ensure the protection of all children under care in child-care facilities and to encourage and assist in the improvement of child-care programs.

Section 42.001; Jurisdictional Statement at A-87.

Appellants contend that they are not properly subject to the licensing provisions because Corpus Christi People's Baptist Church, Inc. is a religious organization, and licensing of its child care institutions impinges upon rights guaranteed by the Religion Clauses of the First Amendment.[1]

In a unanimous decision, the Supreme Court of Texas upheld the constitutionality of the state licensing of Appellant's child-care facilities as violative of neither the Free Exercise nor Establishment Clauses of the First Amendment to the Constitution of the United States. The court's opinion relied closely on well-established federal and state case law and the record below. At the conclusion of the opinion, Chief Justice Pope wrote:

> These cases have been debated and litigated for a number of years upon the claim that the State seeks to regulate religion. This record and those of the prior cases show that the issue is a spurious one. The State has manifested complete disinterest in the religious doctrines that People's Baptist has in the past or may in the future expound. The homes can comply with the law's modest requirements that are mandatory for all other homes. A decision to close the homes will be that of People's Baptist, not the State.

Jurisdictional Statement at A-7 - A-8.

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[1]This claim has twice been decided adversely to the Appellants. *Roloff Evangelistic Enterprises, Inc. v. State*, 556 S.W.2d 856 (Tex.Civ.App.--Austin 1977, writ ref'd n.r.e.), *app. dism'd for want of substantial federal question*, 439 U.S. 803 (1978); *Oxford v. Hill*, 558 S.W.2d 557 (Tex.Civ.App.--Austin 1977, writ ref'd). In both cases, the Texas child-care licensing statute was upheld as constitutional when applied to child-care facilities operated by religious institutions.

Appellant's motion to the Supreme Court of Texas for rehearing was denied. This appeal followed.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE DECISION BELOW SHOULD BE AFFIRMED

Appellants seek compulsory review by appeal pursuant to 28 U.S.C. § 1257(2). Jurisdictional Statement at 2. This Court has repeatedly stated that for a state court decision to be brought to this Court for review, a substantial federal question must be involved. Where a federal question has been explicitly foreclosed by a decision or decisions of the Supreme Court so as to leave no room for real controversy, the decision will not be brought to this Court for review. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902); *Zucht v. King,* 260 U.S. 174, 176-7 (1922).

Appellants essentially bring two questions to the Court: whether state licensing of child-care facilities operated by a religious institution violates either the Free Exercise or Establishment Clause of the First Amendment. Neither question is substantial. Appellants' contentions to the contrary are without merit.

A. State Licensing of Child-Care Facilities Operated by Religious Institutions Clearly does Not Violate the Free Exercise Clause of the First Amendment and, Thus, a Substantial Federal Question is Not Raised

The Texas Supreme Court adopted and applied traditional principles of Free Exercise Clause analysis. Under the First Amendment to the Constitution of the United States, the freedom of Appellants to *believe* as they may see fit remains inviolate, but their freedom to *act* in society is not inviolate and is subject to reasonable regulation by the State for the protection of the society which extends the right of religious freedom. *Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972); *Sherbert v. Verner,* 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut,*

310 U.S. 296, 303-4 (1940); *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Thus, government regulation may lawfully impose an incidental burden on otherwise protected religious conduct.

The Texas Supreme Court correctly elucidated the balancing test traditionally employed to determine the propriety of government regulation where there is an apparent conflict between interests of public welfare and freedom of religion.

> First, the party complaining of a Free Exercise Clause violation must show that the regulations under review impose a substantial burden on the exercise of his religion. Second, if the complaining party demonstrates that it is burdened by the regulations, then the State must have a compelling state purpose for the laws. Relevant to this prong of the test is an inquiry into whether there exists a less restrictive alternative to the regulation.[2]

Jurisdictional Statement at A-5. (The Texas Supreme Court citing *Yoder*, 406 U.S. at 221, *Sherbert*, 374 U.S at 403, 406.)

Upon review of the relevant federal and state law and the record, the Texas Supreme Court held that "the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm." Jurisdictional Statement at A-6. Further, the court held that this compelling state interest outweighs the burden imposed upon the Appellants by the licensing requirement. *Id.*

In finding a compelling state interest, the Texas Supreme Court properly turned to prior cases which recognized a broader and greater state interest in the reasonable regulation of acts performed in accordance with religious beliefs where the welfare

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[2] In a recent discussion of the Free Exercise Clause, the Court did not even reach the balancing test as the claimant did not meet the threshold determination that a sufficient burden had been created. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 53 U.S.L.W. 4489, 4493 (1985) (minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act when applied to religious organizations held not to infringe on rights protected by the Free Exercise Clause).

and safety of children was involved. *Prince v. Massachusetts*, 321 U.S. 158, 168, 169 (1944); *see also Jones v. Alexander*, 59 S.W.2d 1080, 1081 (Tex. 1933).

The state interest in the protection of children is particularly compelling where child-care facilities are involved.

> The State must be especially concerned with the welfare of children residing in child-care facilities. The parents of these children are absent. The children who reside in these homes are entirely dependent upon the operators and employees for their food, shelter and care. Communication with those outside the facility is wholly controlled by the institution. The staff at the homes exercise total supervision over the children's health, safety and well-being. They direct even the smallest details of the children's daily lives.

Jurisdictional Statement at A-6.

The state's interest in assuring that the basic needs and basic rights of children in child-care facilities are met and protected is supported in federal and state law. In *Kansas ex rel. O'Sullivan v. Heart Ministries, Inc.*, 607 P.2d 1102 (Kan. 1980), *app. dism'd for want of substantial federal question*, 449 U.S. 802 (1980), the Kansas Supreme Court faced a similar challenge to the state's licensing of religious child-care facilities. There, the court found:

> The compelling interest of the state, as *parens patriae*, is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To these requirements the defendants' free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the state must protect.

Id. at 1112.

The Texas Supreme Court correctly construed the record and

legislative intent and history of the state regulation as affording the least restrictive and effective means of protection of children in child-care facilities.

> Licensing and regulation of child-care facilities are the least restrictive of the alternatives that the State could provide for the protection of children. Without these procedures the State could not gather vital information about a child-care facility that it must have to fulfill its duty to protect the health and well-being of the children residing there. No entity other than the State can carry out these responsibilities for the public.

Jurisdictional Statement at A-7.

The Human Resources Code explicitly protects religious child-care facilities from State intrusion into protected areas. Sec. 42.001 expresses the intent of the legislature that freedom of religion is inviolate and cautions that "... nothing in this chapter gives a governmental agency authority to regulate, control, or supervise, or in any way be involved in the form, manner, or content of religious instruction or the curriculum of a school sponsored by a religious organization." Jurisdictional Statement at A-87. Sec. 42.042(k) explicitly prohibits the State from regulating or attempting to regulate or control "the content or method of any instruction or curriculum of a school sponsored by a religious organization." Jurisdictional Statement at A-97.

Thus, the Texas Supreme Court adopted and correctly applied the traditional Free Exercise Clause analysis in determining that the compelling state interest in protecting children in child-care facilities outweighs the burden imposed upon the Appellants by the licensing requirements. *See also Roloff Evangelistic Enterprises, Inc. v. State,* 556 S.W.2d 856 (Tex.Civ.App.--Austin 1977, writ ref'd n.r.e.). *app. dism'd for want of substantial federal question,* 439 U.S. 803 (1978); *Oxford v. Hill,* 558 S.W.2d 557 (Tex.Civ.App.--Austin 1977, writ ref'd) *Kansas ex rel O'Sullivan v. Heart Ministries, Inc.,* 607 P.2d 1102 (Kan. 1980), *app. dism'd for want of substantial federal question,* 449 U.S. 802 (1980).

B. State Licensing of Child-Care Facilities Operated by Religious Institutions Clearly does Not Violate the Establishment Clause of the First Amendment and, Thus, a Substantial Federal Question is Not Raised

The Supreme Court of Texas correctly determined that the Free Exercise Clause represents a more appropriate and direct vehicle through which to question the constitutionality of the state regulation than does the Establishment Clause. Jurisdictional Statement at A-4. Nonetheless, the Court applied the appropriate standard for assessing establishment clause challenges: the three pronged-test espoused in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 238 n.6 (4th Cir. 1984). Under that analytical test, the challenged legislation fails constitutionally unless it is found to have a secular legislative purpose, to have a primary effect that does not advance or inhibit religion, and to have no potential for fostering excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13; Jurisdictional Statement at A-3.

The court then noted that Appellant's reliance on the Establishment Clause was misplaced. The court distinguished Establishment Clause cases:

> The Establishment Clause cases address the issue of whether some form of goverment *aid*, either direct or indirect, to a religious institution violates the Establishment Clause. See e.g. *Mueller v. Allen*, [463 U.S. 388 (1983)] (statute allowing parents tax deduction for expenses incurred in sending their children to parochial schools); *Lemon* (statute providing state aid in form of salary supplements, textbooks and instructional material for nonsectarian subjects); *Walz [Walz v. Tax Commission*, 397 U.S. 664 (1979)] (statute granting property tax exemptions to religious organizations for religious properties).

Jurisdictional Statement at A-3 - A-4.

The instant case, by contrast, involves government *regu-*

lation. Such a distinction leads to two logical conclusions, each of which undermines Appellant's reliance on the Establishment Clause. First, the court noted:

> Requiring nonreligious child-care facilities to comply with the state licensing and regulatory scheme while exempting religious facilities would result in unequal state treatment of the two classes of institutions. This unequal treatment could, arguably, be impermissable under the second-prong of the Establishment Clause test because the primary effect would be to advance religion.

Jurisdictional Statement at A-4.

Second, the Court distinguished the type of entanglement discussed in traditional Establishment Clause cases and that discussed by Appellants.

> In those cases, the State must examine and determine what programs are religious and what programs are secular to ensure that government aid reaches only the nonreligious ones. In our case, the state regulatory scheme prohibits inquiry into the religious content of the homes' curriculum. The purpose of these regulations is to assure that all child-care facilities, secular and nonsecular, meet certain minimum standards in areas such as financial solvency, staff-child ratio, nutrition and medical care.

Jurisdictional Statement at A-4.

Accordingly, the court held that state licensing of child-care facilities does not violate the Establishment Clause of the First Amendment. This determination, as shown, is supported by both federal law and the record.

CONCLUSION

For all the reasons stated herein, this appeal should be dismissed or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney
General for Litigation

MARY F. KELLER
Special Assistant
Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-0671

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the _____ day of _____, 1984, to all counsel of record as of this date.

_____

MARY F. KELLER
Special Assistant Attorney
General